Supreme Court, U.S.
FILED
JUN 30 1997
OFFICE OF THE CLERK

(19)

No. 96-779

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1996

THE ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

Brief of Amicus Curiae, Greens / Green Party USA (Filed on consent)

JOHN C. KLOTZ
Counsel of Record
885 THIRD AVENUE, SUITE 2900
NEW YORK, NY 10022
(212) 230-2162
Counsel for Amicus
Greens / Green Party USA

June 27, 1997

17pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

INTERESTS OF AMICUS GREEN PARTY..... 1

STATEMENT OF THE CASE..... 2

FACTS OF THE CASE 2

1. ESSENTIAL TO CONSTITUTIONAL GOVERNMENT AND INHERENT IN THE DEFINITION OF FREEDOM PROTECTED IN THE CONSTITUTION IS THE RIGHT OF THE PUBLIC TO FREE AND FAIR ELECTIONS..... 3

2. THE STATE OF ARKANSAS HAVING DETERMINED THAT RESPONDENT FORBES HAD DEMONSTRATED A SUFFICIENT MODICUM OF SUPPORT TO MERIT BALLOT ACCESS, OTHER STATE ACTORS . OR INDIVIDUALS WITH GOVERNMENT CREATED OR REGULATED POWER . OUGHT NOT BE ALLOWED TO RENDER THAT DETERMINATION MOOT..... 7

3. THE PUBLIC'S RIGHT TO FREE AND FAIR ELECTIONS REQUIRES THE INCLUSION IN TELEVISED ELECTION DEBATES OF ALL CANDIDATES WHO HAVE OBTAINED BALLOT STATUS..... 8

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Anderson v. Celebrezze, 460 U.S. 780; (1983).....7
Anderson v. United States, 417 U.S. 211 (1974).....3
Board of Educ. Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982):.....5
CBS, Inc. v. F.C. C., 453 U.S. 367 (1981).....12
Columbia Broadcasting System, Inc. v. Democratic Nat. Committee, 412 U.S. 94, 115 (1973).....13
Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989).....9
Forbes v. Arkansas Educ. Comm'n, 93 F.3d 497, 504-505 (8th Cir. 1996).....8
Jenness v. Fortson, 403 U.S. 431, 442 (1971).....7
Noble State Bank v. Haskell, 219 U.S. 104; 110 (1911).....14
U. S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 115 Sup. Ct. 1842 (1995).....3
United States v. Classic, 313 U.S. 299 (1941).....3
Whitney v. California, 274 U.S. 357, 375 (1927).....5
Williams v. Rhodes, 393 U.S. 23 (1968).....7

STATUTES

Section 135 of the Federal Communications Act, 47 U.S.C. Sec. 31..... 11

Interests of Amicus Greens / Green Party

Greens / Green Party USA (the "Green Party") was incorporated in the State of Missouri in 1993 as a national political party under section 527 of the Internal Revenue Code. Green Party candidates have been running for local, state and national office since 1985, and have elected more than a hundred candidates for public office throughout the country. The Green Party candidate for U.S. Senate in Alaska in 1996, Ted Whittaker, polled more than 12% of the vote, finishing ahead of the Democratic nominee. The 1995 Green nominee for Governor in New Mexico polled more than 10% of the vote. The Greens won at least ten elections in 1996, including a majority of the City Council in Arcata, California. The Green Party is committed to the principles of ecology, social justice, grassroots democracy, nonviolence, decentralization, community economics, feminism, respect for diversity, personal and global responsibility and future focus.[1]

The Green Party candidate for President in 1996, Ralph Nader, appeared on the ballot in 22 states and received the fourth highest total nationwide of votes cast for President with nearly 700,000. Mr. Nader however, despite repeated public opinion polls finding that he is the most trusted public individual in the United States, was excluded from the 1996 Presidential debates. The Green Party motion to intervene in the Natural Law Party and Perot lawsuits challenging the exclusion of .third party. candidates to participate in the Presidential debates was denied.

Other Green Party candidates have routinely been excluded from televised debates. For instance, Mark Dunlea, the 1995 Green Party nominee for Rensselaer County Executive (NY) was not allowed to participate in a debate organized and televised by the local ABC affiliate, even though he was an incumbent elected Town Board member and

---

[1] Green / Green Party USA paid for this brief to be printed. Rachel Treichler, Esq and Mark Dunlea, Esq. Assisted in preparattion.

had polled 37% of the vote (21,000) in his previous election for State Assembly as the Green and Democratic nominee. Mr. Dunlea polled 11% of the vote for County Executive, a total larger than the margin of difference between the Republican and Democratic nominee.

Statement of the Case

The issue to be decided by the Court is whether the decision of the petitioner Arkansas Educational Television Commission to exclude the petitioner from a television debate violated not only the free speech rights of petitioner Ralph P. Forbes, a candidate for Congress, but also the free election rights of local voters.

Facts of the Case

A publicly owned broadcasting station, Arkansas Educational Television Commission ("AETC"), excluded Ralph P. Forbes, an independent candidate for Congress in the Third District of Arkansas, from a television debate in October of 1992. Even though Mr. Forbes had obtained sufficient signatures to appear on the ballot for the election, AETC excluded Mr. Forbes from the debate because AETC subjectively determined that he did not have sufficient "political viability". The trial court determined that the television debate was a non-public forum, and that Forbes' First Amendment protections had not been violated by the decision to exclude him.

The U.S. Court of Appeals for the 8th Circuit reversed the lower court's determination, finding that the television debate was a limited-purpose public forum "without reservation" and ruled that the Arkansas Educational Television Commission ("AETC") had violated Forbes' First Amendment rights when they excluded him from the debate. Since the 8th Circuit deemed the television debate a limited-purpose public forum, the court stated that AETC had to show a compelling government interest to restrict Forbes' political speech. They

failed to do so. The court concluded that "the reason given for excluding Mr. Forbes (and we accept at face value the defendants' proffered reason) was not legally sufficient under the First Amendment."

Reasons for affirming the right of Candidate Petitioner to Participate in Debate

1. Essential to constitutional government and inherent in the definition of freedom protected in the constitution is the right of the public to free and fair elections.

This Court has held that free and fair elections are a constitutional right. *United States v. Classic*, 313 U.S. 299, 315 (1941) and *Anderson v. United States*, 417 U.S. 211 (1974). The right to participate in the electoral process lies at the very heart of our system of government. Recently, in its decision striking down state attempts to limit the terms of members of Congress, the Supreme Court had occasion to comment on the central nature of the right to vote in our Constitutional system. *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 Sup. Ct. 1842 (1995).

> "*** sovereignty confers on the people the right to choose freely their representatives to the National Government. For example, we noted that "Robert Livingston *** endorsed this same fundamental principle: 'The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights.' " 395 U.S., at 541, n. 76, 89 S.Ct., at 1974, n. 76, quoting 2 Elliot's Debates 292-293. Similarly, we observed that "[b]efore the New York convention ***, Hamilton emphasized: 'The true

principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed.' " 395 U.S., at 540-541, 89 S.Ct., at 1974, quoting 2 Elliot's Debates 257. Quoting from the statement made in 1807 by the Chairman of the House Committee on Elections, we noted that "restrictions upon the people to choose their own representatives must be limited to those 'absolutely necessary for the safety of the society.' " 395 U.S., at 543, 89 S.Ct., at 1975, quoting 17 Annals of Cong. 874 (1807). Thus, in Powell, we agreed with the sentiment expressed on behalf of Wilkes' admission to Parliament: " 'That the right of the electors to be represented by men of their own choice, was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our constitution.' " 395 U.S., at 534, n. 65, 89 S.Ct., at 1971, n. 65, quoting 16 Parl.Hist.Eng. 589-590 (1769).

"Powell thus establishes two important propositions: first, that the "relevant historical materials" compel the conclusion that, at least with respect to qualifications imposed by Congress, the Framers intended the qualifications listed in the Constitution to be exclusive; and second, that that conclusion is equally compelled by an understanding of the "fundamental principle of our representative democracy *** '*that the people should choose whom they please to govern them.*' " 395 U.S., at 547, 89 S.Ct., at 1977. (emphasis supplied) 115 Sup. Ct. at 1851

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) quotes founding father James Madison:

> "Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." 4 J. Elliot, *Debates on the Federal Constitution* 575 (1861)."

We deny voters access to the information necessary for an informed electoral decision at our peril. Said Madison, as quoted in *Board of Educ. Island Trees Union Free School Dist. No. 26 v. Pico,* 457 U.S. 853 (1982):

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

Similarly, Mr. Justice Brandeis in *Whitney v. California,* 274 U.S. 357, 375 (1927):

> "Those who won our independence believed * * * that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear

breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. *Believing in the power of reason as applied through public discussion*, they eschewed silence coerced by law--the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." (Emphasis supplied)

Although we urge this court to affirm the decision of the appeals court, we also urge that your decision recognize that the fundamental legal issue presented by the case before you is not whether AETC's decision to exclude Forbes from the debate was legally sufficient under the First Amendment right to free speech but rather under the constitutional right to a free election. The issue is whether AETC's actions impinged on the right of the citizens of the state of Arkansas to a free election by curtailing their right to receive essential information about one of the candidates on the ballot.

It submitted that this right to free and fair elections is an intrinsic part of the .freedom. protected by the Fifth and Fourteenth Amendments of the Constitution

"Free elections" are right of each citizen of the Republic, a right needed to make our Constitution work. It is the need for the for the .truth. which is produced and discerned through the process of public debate. This deliberative process of debate that enables the electorate to hear and discern the truth is the essence of our democracy. The process of discerning the truth is not something determined by public opinion polls or evaluation of newsworthiness or the amount of campaign contributions that are received. It is certainly not something to be solely determined, even under the guise of "objective

standards" by those who own or control the media or organize public forums.

2. The State of Arkansas having determined that respondent Forbes had demonstrated a sufficient modicum of support to merit ballot access, other state actors – or individuals with government created or regulated power – ought not be allowed to render that determination moot.

There is an undeniable interest of states and the federal government in limiting ballot access to those who have demonstrated an objectively determined measure of support. In *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), the Court said:

> "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot -- the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."

On the other hand, that right to control ballot access is subject to strictest scrutiny particularly where it discriminates among competing candidates and parties. *Anderson v. Celebrezze*, 460 U.S. 780; (1983); *Williams v. Rhodes* , 393 U.S. 23 (1968).

> "The broadcaster should not have any right to make a decision as to who can participate in the debate, regardless of the criteria utilized. AETC's opinion on such a debatable matter as the political viability of a candidate for Congress more than two months in advance of the election can not be a sufficient basis

for narrowing the channels of public discourse. They are inherently subjective."

As the Court of Appeals itself noted in its decision upholding Mr. Forbes' right to participate in the debate:

"The real issue, we think, is the legal sufficiency of the reason given for the exclusion. If AETC had considered Mr. Forbes a viable candidate, it would, by its own account, have included him in the debate. There is nothing about being a Democrat or a Republican, a priori, that is relevant here. Rather, AETC's point is that Mr. Forbes, in the opinion of the network, had no chance to win. It therefore decided that its viewers should not hear Mr. Forbes's opinions as part of the debate involving the other candidates qualified to appear on the ballot."

"In a sense, the State of Arkansas had already, by statute, defined political viability. Mr. Forbes had gathered enough signatures to appear on the ballot. So far as the law was concerned, he had equal status with the Republican and Democratic nominees. Whether he was viable was, ultimately, a judgment to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communication." *Forbes v. Arkansas Educ. Comm'n*, 93 F.3d 497, 504-505 (8th Cir. 1996).

3. The public's right to free and fair elections requires the inclusion in televised election debates of all candidates who have obtained ballot status.

The exclusion of independent and minor party candidates from televised election debates improperly abridges the rights of the public to free and fair elections. The election process guaranteed by our constitution mandates that the public be given full access to direct communication with all candidates

who have obtained ballot status. Access by all candidates to the "market of ideas" represented by election debates is critical to the public's ability to make meaningful and informed balloting decisions for public officials.

In 1988 and 1992, exit polls showed that in the presidential elections, more voters based their balloting decision on the debates than on any other single factor. In 1992 the television audience for the third and final presidential debate was 97 million viewers. In the words of the Commission on Presidential Debates: "These events have become central education forums which Americans expect, watch, and value."

A candidate's right to participate in televised debate is a necessary concomitant and consequence of the right of the electorate to effectively and intelligently cast their ballot and the need of the nation as a whole for deliberative consideration of public policy choices. Without the inclusion of all candidates in election debates, voters enter polling booths and find names of candidates they know nothing about on the ballot. In such a situation it is impossible to make an informed choice. That is not a free election. It is not an election.

Restrictions on the participation of candidates in election debates should therefore be subject to the strictest scrutiny. See e.g., *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989) which held that a California ban on endorsements by party committees abridged the parties right to free speech. In *Eu*, the Court said:

"A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.' " *Tashjian*, supra, 479 U.S., at 221, 107 S.Ct., at 552 (quoting *Anderson v. Celebrezze*, supra, 460 U.S., at 798, 103 S.Ct., at 1575). While a State may regulate the [489 U.S. 229] flow of information between political associations

and their members when necessary to prevent fraud and corruption, see *Buckley v. Valeo*, 424 U.S., at 26-27, 96 S.Ct., at 638-639; *Jenness v. Fortson*, supra, 403 U.S., at 442, 91 S.Ct., at 1976. Tthere is no evidence that California's ban on party primary endorsements serves that purpose." 489 U.S. at 228, 229.

In our day and age, the need to communicate over the public airwaves is an inseparable part of the electoral process. At the time the constitution was drafted, in 1787, voting was by meetings with speeches followed by voting.

The election process guaranteed by our constitution mandates that the public be given full access to direct communication with all candidates in order to allow the public to make informed decisions as whether or not to vote, and for which candidates. Given the monopoly control of information by the media, to permit broadcasters to select the candidates the public learns about completely nullifies our election processes.

The act of exclusion of a candidate from a debate is a fatal blow to the candidate's chances on election day. Exclusion implies that the ideas of the excluded candidate are too extreme, too radical, or too uninformed. It implies that the candidate does not have significant popular support and that a vote for him/her, rather than one of the included candidates, will be a wasted vote.

Because of the enormous cost of purchasing television air time, it is not an answer to remit candidates to purchase time as a substitute for free debate time. Free elections are the core provision of our constitution. To require candidates to buy a piece of the public airwaves at enormous sums in order to communicate their ideas is a travesty of the constitutional right to a free and fair election.

Neither is the limited obligations of the broadcasters to provide public access to the airwaves under the fairness doctrine contained in Section 135 of the Federal Communications Act, 47 U.S.C. Sec. 315 (the .fairness doctrine.) a sufficient to meet the constitutional requirements for free and fair elections. The fairness doctrine allows broadcasters to deny access to those whom in their subjective judgment (or calculated self-interest) are not "news" or "newsworthy". This ability under the fairness doctrine of broadcasters to select the candidates the public learns about nullifies the entire election processes and is completely contrary to our entire system of government.

"No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights, even the most basic, are illusory in the right to vote is undermined." *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846 (U.S.Tenn. 1992) 119 L.Ed.2d 5, 60 USLW 4393, 20 Media L. Rep. 11 37 Decided May 26, 1992 citing *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 535, 11 L.Ed.2d 481 (1964).

The legislature is the body under our constitution that has the right to determine the requirements to be a candidate in an election. A candidate who meets the legislature's requirement for ballot access – generally the gathering of large numbers of signatures from registered voters signifying their interest in the candidate's participation in the election – must be able to communicate his or her ideas to the public without paying an exorbitant access fee to the media.

A system which effectively requires a candidate to buy advertising time if his or her views are to receive any public airing leads to a perception of corruption in the electoral process when the amount of money required for such purchases is far beyond the reach of individuals not allied with substantial monetary resources.

This Court recognized in *Buckley vs. Valeo,*. 424 U.S. 1, 46 96 S.Ct. 612, L.Ed.2d 659, 76-1 USTCP 9189, that "(t)he electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech."

Surely the Court would not hold that the right of effective political speech is a right only of the wealthy. Madison in Federalist Papers #57 said it well:

> "Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of the country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people."

The First Amendment does not give broadcasters a license to exclude candidates from communicating with the public. Should the public's constitutional right to free and fair elections conflict with the first amendment rights of broadcasters, the rights of the public to free elections are paramount. *CBS, Inc. v. F.C. C.*, 453 U.S. 367 (1981):

> "It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market ***. It is the right of the public to receive suitable access to social, political esthetic, moral, and other ideas and experience which is crucial here." *Red Lion Broadcasting Co. v. FCC*, 395 U.S., at 390, 89 S.Ct., at 1806.
>
> "The First Amendment interests of candidates and voters, as well as broadcasters, are implicated by Sec.

> 312(a)(7). We have recognized that "it is of particular importance that candidates have the *** opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *Buckley v. Valeo*, 424 U.S. 1, 52-53, 96 S.Ct. 612, 651, 46 L.Ed.2d 659 (1976). Indeed, "speech concerning public affairs is *** the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 215-216, 13 L.Ed.2d 125 (1964). The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971). Section 312(a)(7) thus makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."

Mr. Justice Holmes cautioned against taking even Constitutional principles to "drily logical extremes." *Noble State Bank v. Haskell*, 219 U.S. 104; (1911) This is particularly true when competing interests are at stake that need to be harmonized, not lobotomized.. Colliding in the matter at bar are claims of free speech by those to control the forum, access to means of speech by candidates in the electoral process and the increasingly undisputed dominance of the political process by monied interests who seek to equate money with speech. The Green Party submits that when balancing these competing interests that another – even more fundamental – right must not only be harmonized in, but predominate, the result. That is the interests of the public in a free and meaningful election process.

By upholding the fairness doctrine, this Court has already demonstrated that the broadcasters who are the beneficiaries of regulatory largess, have a reciprocal obligation to the public

weal. That obligation is to foster the market place of ideas . not auction it off to the highest bidder.

Conclusion

It is respectfully submitted that the judgment below be affirmed insofar as the respondent's right to be included in the campaign debate is concerned.

Dated: New York, New York
June 27, 1998

Respectfully Submitted,

JOHN C. KLOTZ
Counsel of Record
885 Third Avenue, Suite 2900
New York, NY 10022
(212) 230-2162
Counsel for Amicus Green Party USA